

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
UNITED STATES DEPARTMENT OF JUSTICE REVISED
MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS* LANDOWNER
CONSENT DECREE**

May 13, 2004

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA or DOJ applies them to a particular case will depend upon the facts of the case.

**REVISED MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS*
LANDOWNER CONSENT DECREE**

[For Settlement with Landowners under CERCLA § 122(g)(1)(B)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [_____]
[_____] DIVISION¹

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civil Action No. ____
v.)	
)	Judge _____
[INSERT DEFENDANT’S NAME],)	
)	
Defendant.)	
)	

CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to [insert causes of action and relief sought, *e.g.*, "Sections 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9606 and 9607(a), seeking injunctive relief regarding the cleanup of the [insert site name] in [insert City, County, [State/Commonwealth]] ("Site"), and recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Site"].

B. As a result of the release or threatened release of hazardous substances at the Site, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604 [and will undertake response actions in the future]. In performing these response actions, EPA has incurred [and will continue to incur] response costs at or in connection with the Site. **[OPTIONAL: Insert brief description of response actions undertaken at (or proposed for) the Site to date by EPA or other persons, noting whether a removal, RI/FS or ROD(s) have been completed. Describe briefly any previous settlements**

¹ Follow local rules for caption format.

for performance of work or recovery of costs.]

C. EPA has determined the following:

1. Settling Defendant is an “owner,” as defined in Section 101(20), 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), of a “facility,” as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), and is a “potentially responsible party” within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1);

2. prompt settlement with Settling Defendant is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1);

3. **[NOTE: Use this Subparagraph where the consideration includes a cash payment. The dollar figure inserted should include the total response costs incurred to date as well as the Agency's projection of the total response costs to be incurred during completion of the remedial action at the Site. The response cost total should include United States' costs and costs incurred by other persons.]** The payment to be made by Settling Defendant under this Consent Decree involves only a minor portion of the response costs at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1), based upon EPA's estimate that the total response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund and by other persons is [insert either "\$____" or "between \$____ and \$____"]; and

4. Based upon information currently known to EPA, EPA has determined that Settling Defendant qualifies for a *de minimis* settlement pursuant to Section 122(g)(1)(B) of CERCLA, 42 U.S.C. § 9622(g)(1)(B).

D. Settling Defendant does not admit any liability to the United States arising out of the transactions or occurrences alleged in the complaint.

E. The United States and Settling Defendant agree that settlement without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action with respect to Settling Defendant.

F. The Parties agree and this Court, by entering this Consent Decree finds, that this Consent Decree has been negotiated by the parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED, and DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9606, 9607 and 9613(b), and also has personal jurisdiction over Settling Defendant. Settling Defendant consents to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon Settling Defendant and Settling Defendant's [heirs,] successors and assigns. Any change in ownership or corporate or other legal status of Settling Defendant, including but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Decree.

IV. STATEMENT OF PURPOSE

[NOTE: As drafted, this Statement of Purpose assumes that Settling Defendant is providing valuable consideration which may include any combination of access, cooperation, institutional controls, cash, work, etc., in exchange for a full and final settlement with the United States for all civil liability under CERCLA Sections 106 and 107 with respect to the Site as a whole. When using this or any other Statement of Purpose, be sure that it is consistent with the Covenant Not to Sue, the Reservations of Rights, and the definition of "matters addressed" in the Contribution Protection provision.]

3. By entering into this Consent Decree, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows Settling Defendant to provide valuable consideration to the United States to resolve Settling Defendant's alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a potentially responsible party from further involvement at the Site; [and]

c. **[Use this Subparagraph (c) where the consideration includes a cash payment]** to obtain settlement with Settling Defendant for Settling Defendant's fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons; and

d. to provide for full and complete contribution protection for Settling Defendant

with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), in accordance with Section XIV herein.

V. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

e. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

f. **[Use this definition if the consideration includes a cash payment.]**
"Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.²

g. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

h. "Parties" shall mean the United States and the Settling Defendant.

i. "Property" shall mean that portion of the "Site" that is owned by Settling

² The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at http://www.epa.gov/budget/finstatement/superfund/int_rate.htm.

Defendant. **[If Property and Site are the same, then define Site only, but include in the definition a description of the property.]**

j. "Response costs" shall mean all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

k. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

l. "Settling Defendant" shall mean [insert name].

m. "Site" shall mean the _____ Superfund Site, encompassing approximately ____ acres, located at [insert address or description of location] in [insert City, County, [Commonwealth]] and [insert either "generally shown on the map attached as Appendix A" or "generally designated by the following property description: _____."]

n. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

VI. PAYMENT

[NOTE: Where settlement with a *de minimis* landowner does not require a cash payment, delete Section VI and re-number the rest of the Consent Decree.]

5. Within 30 days after the effective date of this Consent Decree, Settling Defendant shall pay to the EPA Hazardous Substance Superfund \$_____.

6. **[NOTE: The following language should be used if payment is above \$25,000.]** Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with EFT instructions provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the District of _____ following lodging of the Consent Decree.

[NOTE: The following alternative language may be used if the payment amount is less than \$25,000.] Payment shall be made by certified or cashier's check made payable to "U.S. Department of Justice," referencing the name and address of the party making payment, the EPA Region and Site/Spill ID Number _____, DOJ Case Number _____, and the civil action number. Settling Defendant shall send the check to:

[Insert address of Financial Litigation Unit of U.S. Attorney's Office for the District in which the Consent Decree will be entered.]

7. At the time of payment, Settling Defendant shall send notice that such payment has been made to:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
DJ No. _____
P.O. Box 7611
Washington, D.C. 20044-7611

[Insert name and address of Regional Attorney or Remedial Project Manager and Regional Financial Management Officer.]

Such notice shall reference the EPA Region and Site/Spill ID Number _____, DOJ case number _____, and the civil action number.

[NOTE ON USE OF SPECIAL ACCOUNT PAYMENTS: The payment made under Section VI may be deposited in the EPA Hazardous Substance Superfund or may be deposited in a site-specific special account within the EPA Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”). A site-specific special account should only be considered if the amount of money being recovered in a settlement justifies the incurrence of the expense of setting up such an account, or if a site-specific special account for the Site already exists. If the negotiating team believes that a site-specific special account is appropriate, the Consent Decree should include clear instructions indicating which portion of the payment is to be placed in the EPA Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Sample instructions for the three possible deposit options (EPA Hazardous Substance Superfund, special account, or split between the EPA Hazardous Substance Superfund and special account) follow.]

8. [Insert one of the three sample paragraphs here.]

[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:]

The total amount to be paid by Settling Defendant pursuant to Section VI shall be deposited by EPA in the EPA Hazardous Substance Superfund.

[If the entire payment will be deposited in a special account:]

The total amount to be paid by Settling Defendant pursuant to Section VI shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]

Of the total amount to be paid by Settling Defendant pursuant to Section VI, ['\$_____' or '_____%'] shall be deposited by EPA in the EPA Hazardous Substance Superfund and ['\$_____' or '_____%'] shall be deposited by EPA in the [Site Name] Special Account within the EPA

Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

[OPTIONAL: __. WORK TO BE PERFORMED]

VII. FAILURE TO[MAKE PAYMENT][COMPLY WITH REQUIREMENTS OF CONSENT DECREE]

9. **[If consideration includes a cash payment insert following bracketed language.]**
[If Settling Defendant fails to make full payment within the time required by Section VI, Settling Defendant shall pay Interest on the unpaid balance. In addition,][if/If] Settling Defendant fails [to make full payment as required by Section VI or] to comply with the requirements of Section VIII or IX [or __ (insert reference to work requirements or notice to successors-in-title, if any)] of this Consent Decree, the United States may, in addition to any other available remedies or sanctions, bring an action against Settling Defendant seeking injunctive relief to compel compliance with this Consent Decree and/or seeking civil penalties under Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), for the failure to comply. **[NOTE: If the Settling Defendant is to perform remedial action under the Consent Decree, stipulated penalties pursuant to Section 121(e)(2) must be included.]**

VIII. ACCESS AND INSTITUTIONAL CONTROLS

10. **[NOTE: This Section should be used if Settling Defendant is a Site owner or otherwise controls access to the Site or to other property to which access is needed. Where no institutional controls, land use restrictions, or environmental easements are necessary, or will be necessary, the Section can be substantially reduced. Subparagraph (a) of the first paragraph should be used to secure access. Subparagraph (b) of the first paragraph should be included if EPA determines that land/water use restrictions are needed on property owned by Settling Defendant to ensure the integrity or protectiveness of the remedial action. Subparagraph (c) of the first paragraph should be included if EPA determines that a property interest running with the land (granting either a right of access or a right to enforce land/water use restrictions) should be acquired by EPA or another grantee from Settling Defendant.]**

[__. If the Site, or any other property where access and/or land/water use restrictions are needed to implement response activities at the Site, is owned or controlled by Settling Defendant, Settling Defendant shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States [the State [Commonwealth]] and its [their] representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to the following activities:

- Site;
1. Monitoring, investigation, removal, remedial or other activities at the
 2. Verifying any data or information submitted to the United States [or the State [Commonwealth]];
 3. Conducting investigations relating to contamination at or near the Site;
 4. Obtaining samples;
 5. Assessing the need for, planning, or implementing additional response actions at or near the Site;
 6. Assessing Settling Defendant's compliance with this Consent Decree;
- and
7. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree.

b. commencing on the date of lodging of this Consent Decree, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity or protectiveness of the [removal or] remedial measures to be performed at the Site; such restrictions include, but are not limited to **[LIST SPECIFIC RESTRICTIONS]**; and

c. execute and record in the Recorder's Office [or Registry of deeds or other appropriate land records office] of _____ County, State [Commonwealth] of _____, an easement, running with the land, that (i) grants a right of access for the purpose of conducting response activities at the Site listed in Paragraph_____, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph (b) above **[cross-reference immediately preceding paragraphs]** of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the [removal or] remedial measures to be performed at the Site. Settling Defendant shall grant the access rights and the rights to enforce the land/water use restrictions to [(i) the United States, on behalf of EPA, and its representatives, (ii) the State [Commonwealth] and its representatives, (iii) and/or other appropriate grantees³]. Settling Defendant shall, within

³ If, at the time that a Consent Decree is being negotiated, EPA is not able to determine which persons should be the grantees of the easement, this Subparagraph (c) should be redrafted to insert the phrase "one of more of the following persons, as determined by EPA," prior to the bracketed list of potential grantees.

45 days of entry of this Consent Decree,⁴ submit to EPA for review and approval with respect to such property:

1. A draft Easement, in substantially the form attached hereto as Appendix _____ that is enforceable under the laws of the State [Commonwealth] of _____; and
2. A current title insurance commitment or some other evidence of title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendant is unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's approval and acceptance of the easement, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, record the easement with the Recorder's Office [or Registry of Deeds or other appropriate office] of _____ County. Within 30 days of recording the easement, Settling Defendant shall provide EPA with final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded easement showing the clerk's recording stamps. If the easement is to be conveyed to the United States, the easement and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 255.

11. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement response activities at the Site, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with EPA's [and the State's [Commonwealth's]] efforts to secure such governmental controls. Settling Defendant shall record the notice of any such governmental controls within 10 days of EPA's approval of the notice. Settling Defendant shall provide EPA with a certified copy of the recorded notice within 10 days of recording such notice.

12. Notwithstanding any provision of this Consent Decree, the United States [and the State [Commonwealth]] retain[s] all of its access authorities related thereto under CERCLA, RCRA and any other applicable statute or regulations.

[OPTIONAL: __. NOTICE TO SUCCESSORS-IN-TITLE]

⁴ If, at the time that a Consent Decree is being negotiated, EPA is unable to determine whether it wants to obtain an easement that runs with the land, but believes that it might want to obtain such an interest in the future, this Subparagraph (c) should be redrafted to insert the phrase "if EPA so requests," at the beginning of the subparagraph, and Settling Defendant should be required to submit the draft easement a certain number of days from the date of EPA's request.

[NOTE: This Section may be needed depending on the specific circumstances of the property owned by Settling Defendant. If there will be significant response activity on such property, or there are institutional controls that may otherwise not be known to subsequent owners, then recordation in local land records may be appropriate. Use only the provisions that apply.]

____. With respect to any property owned or controlled by Settling Defendant that is located within the Site, within 15 days of the effective date of this Consent Decree, Settling Defendant shall submit to EPA for review and approval a notice to be filed with the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State [Commonwealth] of _____, which shall provide notice to all successors-in-title that the Property is part of the Site, that EPA selected a remedy for the Site on _____, and that potentially responsible parties have entered into a Consent Decree requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. Settling Defendant shall record the notice(s) within 10 days of EPA's approval of the notice(s). Settling Defendant shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice(s).

____. At least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, Settling Defendant shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to Section ____ (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "restrictive easements") pursuant to Section ____ (Access and Institutional Controls). At least 30 days prior to such conveyance, Settling Defendant conveying the interest shall also give written notice to EPA and the State [Commonwealth] of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

____. In the event of any such conveyance, Settling Defendant's obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section ____ (Access and Institutional Controls) of this Consent Decree, shall continue to be met by Settling Defendant. In no event shall the conveyance release or otherwise affect the liability of Settling Defendant to comply with all provisions of this Consent Decree, absent the prior written consent of EPA.

IX. DUE CARE AND COOPERATION

13. Nothing in this Consent Decree shall be construed to relieve Settling Defendant of

Settling Defendant's duty to exercise due care with respect to hazardous substances at the Site or Settling Defendant's duty to comply with all applicable laws and regulations.

14. Settling Defendant agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize interference with Settling Defendant's operations by such entry and response. In the event that Settling Defendant becomes aware of any action or occurrence that causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendant shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release.

X. CERTIFICATION OF SETTLING DEFENDANT

15. By signing this Consent Decree, Settling Defendant certifies, individually, that, to the best of its knowledge and belief, it:

a. has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, that relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. has and will comply fully with any and all EPA requests for information regarding the Site pursuant to Sections 104(e), 122(e)(3)(B), and 122(g)(8) of CERCLA, 42 U.S.C. §§ 9604(e), 9622(e)(3)(B), and 9622(g)(8) [insert, if applicable “, and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927”].

XI. COVENANT NOT TO SUE BY UNITED STATES

16. In consideration of the valuable consideration that will be provided by Settling Defendant under the terms of this Consent Decree, and except as specifically provided in Section

XII (Reservations of Rights by United States), the United States⁵ covenants not to sue or take administrative action against Settling Defendant pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,]⁶ relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect upon receipt of Settling Defendant's payment as required by Section VI of this Consent Decree. **[NOTE: If work is to be performed instead of a cash payment, this sentence should read: “upon satisfactory completion of the work specified in the Scope of Work.” If EPA is settling only for access and due care assurances, this sentence should read: “upon the effective date of this Consent Decree.”]** This covenant is conditioned upon the satisfactory performance by Settling Defendant of all obligations under this Consent Decree and the veracity of the information provided to EPA by Settling Defendant relating to Settling Defendant's involvement with the Site. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

XII. RESERVATIONS OF RIGHTS BY UNITED STATES

17. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by the United States in Section XI. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:

- a. claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- b. liability as a result of failure to exercise due care with respect to hazardous substances at the Site;
- c. liability resulting from exacerbation by Settling Defendant of the release or threat of release of hazardous substances from the Site;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;⁷ or

⁵ If any agency other than EPA or DOJ, such as Coast Guard or Federal Emergency Management Agency, has or may incur response costs at the Site, such costs must either be addressed in the settlement or must be excluded from the scope of the covenant not to sue.

⁶ Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

⁷ This natural resource damages reservation must be included unless the Federal Natural Resource Trustee[s] has/have agreed to a covenant not to sue pursuant to Section 122(j)(2) of CERCLA. In accordance with Section
(continued...)

f. liability arising from any future arrangement for disposal or treatment of a hazardous substance, pollutant or contaminant at the Site after the effective date of this Consent Decree.

18. Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, to seek or obtain further relief from Settling Defendant, and the covenant not to sue in Section XI of this Consent Decree is null and void, if information not currently known to EPA is discovered that indicates that Settling Defendant fails to meet any of the criteria specified in Section 122(g)(1)(B).

XIII. COVENANT NOT TO SUE BY SETTling DEFENDANT

19. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site⁸ or this Consent Decree including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the State [Commonwealth] of _____, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.⁹

Except as provided in Paragraph 21 (Waiver of Claims) and Paragraph 23 (Waiver of Claim-Splitting Defenses, these covenants not to sue shall not apply in the event the United States brings

⁷ (...continued)

122(j)(1) of CERCLA, where the release or threatened release of any hazardous substance at the Site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal Natural Resource Trustee[s] of the negotiations and encourage the Trustee[s] to participate in the negotiations.

⁸ If the Consent Decree does not resolve Settling Defendant's liability for the Site as a whole, the scope of Paragraph 19 may be narrowed to conform to the scope of the United States' covenant not to sue.

⁹ The settlement should, consistent with Paragraph 21, release any claims by Settling Defendant against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues, either in this settlement or a future settlement. Settlement of any federal liability will require additional revisions to this document.

a cause of action or issues an order pursuant to the reservations set forth in Paragraph 17(b), (c), (e), or (f) or Paragraph 18, but only to the extent that Settling Defendant's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

20. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

21. Settling Defendant agrees not to assert any claims or causes of action (including claims for contribution under CERCLA) that it may have for all matters relating to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any other person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant; nor shall it apply to any defense, claim, or cause of action arising out of action undertaken by Settling Defendant in response to a release or threat of release in accordance with Paragraph 14 of this Consent Decree.¹⁰

XIV. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

22. Except as provided in Paragraph 21 (Waiver of Claims), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 21 (Waiver of Claims), the United States and Settling Defendant each reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

23. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Section XI.

24. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are [all response actions taken or to be taken and all

¹⁰ This paragraph is not intended to preclude parties from pursuing insurance claims that they may have. The language may be modified in appropriate cases to allow parties to preserve such claims.

response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person.]¹¹

XV. RETENTION OF JURISDICTION

25. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XVI. INTEGRATION/APPENDICES

26. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following is attached and incorporated into this Consent Decree:

"Appendix A" is [the map of the Site].

[NOTE: List any additional appendices.]

[OPTIONAL: __. RELEASE OF LIEN]

[NOTE: This provision should not be used unless a Section 107(l) or 107(r) lien has been perfected. Since a qualifying *de minimis* landowner has to show that he purchased without knowledge of contamination, the purchase price of the property was most likely the fair market value without a reduction for contamination, and therefore the landowner would have realized no windfall due to EPA's response work at the Site.]

__. Subject to the Reservation of Rights in Section XII of this Consent Decree, upon [payment of the amount specified in Section VI] [satisfactory completion of work specified in Section ____], EPA agrees to release any lien it may have on the [Site] [Property] under Section 107 of CERCLA, 42 U.S.C. § 9607, with respect to Settling Defendant. [If settling for access and due care only, then the release of the lien shall take place following the "effective date" of this Consent Decree.]

XVII. PUBLIC COMMENT

27. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States shall file with the Court any written

¹¹ This definition of "matters addressed" assumes that this Consent Decree is designed to resolve fully Settling Defendant's liability at the Site. If the intended resolution of liability is narrower in scope, then the definition of "matters addressed" will need to be narrowed.

comments received and the United States' response thereto. The United States reserves the right to withdraw or withhold its consent if comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper or inadequate. Settling Defendant consents to entry of this Consent Decree without further notice, and the United States reserves the right to oppose an attempt by any person to intervene in this civil action.

XVIII. EFFECTIVE DATE

28. The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Section XVII.

XIX. SIGNATORIES/SERVICE

29. Each undersigned representative of Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice, or [his/her] delegatee, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

30. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

31. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service including, but not limited to, service of a summons, in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court.

32. The Parties agree that Settling Defendant need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XX. DISCLAIMER

33. This Consent Decree in no way constitutes a finding by EPA as to the risks to human health and the environment that may be posed by contamination at the Site nor constitutes any representation by EPA that the Site is fit for any particular purpose.

SO ORDERED THIS ____ DAY OF _____, _____.

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the [insert site name and location]:

FOR THE UNITED STATES OF AMERICA

Date: _____

[Name]
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

[Name]
United States Attorney
[Address]

[Name]
Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U. S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

[Name]
Regional Administrator, Region []
U.S. Environmental Protection Agency
[Address]

[Name]
Assistant Regional Counsel
U.S. Environmental Protection Agency
[Address]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR DEFENDANT [_____]

Date: _____
[Names and address of Defendant's signatories]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: _____

Title: _____

Address: _____